No. 15,164

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

GLENS FALLS INDEMNITY COMPANY, a New York corporation, and E. F. GRANDY, INC., a California corporation,

Appellants,

vs.

AMERICAN SEATING COMPANY, a New Jersey corporation,

Appellee.

APPELLANTS' SUPPLEMENTAL OPENING BRIEF.

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APPELLANTS' SUPPLEMENTAL OPENING BRIEF.

An appeal was docketed in this case under number 14,258. A transcript of record was filed and the following briefs were filed: Appellants' Opening Brief, Appellee's Answering Brief and Appellants' Reply Brief. The case was argued and submitted. The appeal was dismissed as premature because the judgment did not dispose of the whole case nor conform to F. R. C. P. 54(b) (see 225 F. 2d 838). After the remittitur was filed, Appellee, which is the plaintiff, dismissed the party concerning which the judgment was silent.

The case is before the court again on the original record plus the record of the intermediate proceedings. Pursuant to stipulation and with the consent of the court, the original Transcript of Record and the original briefs will again be used. A Supplemental Transcript of Record has been prepared and the original briefs are to be supplemented as required. For this reason, reference will be made to the original Transcript of Record as "R." and to the Supplemental Transcript of Record as "Sup. R."

I.

Statement of the Pleadings and Facts Disclosing Jurisdiction.

The statement contained in the original Opening Brief is complete on this subject except for the fact that Appellee dismissed as to The Farmers and Merchants Bank of Long Beach, which is no longer a party to the action. It appears to Appellants that the judgment which had been the subject of the earlier appeal became final when the order of dismissal was entered because it was then determinative of all of the issues as to all of the parties remaining in the case. Appellants' appeal from this judgment out of abundance of caution although it was later set aside and a new judgment in a different amount was entered. Appellants also appeal from this later judgment and they believe that this is the true final judgment in the action. The court is respectfully referred to the original Opening Brief for the jurisdictional statement (App. Op. Br., Sec. I, pp. 1 and 2).

II.

The Nature of the Proceedings in the Trial Court.

The proceedings in the trial court were confused from the beginning and continued so to the end.

After the Court of Appeals had determined that the judgment was not final and had returned the case to the trial court, Appellants moved to set aside the findings of fact, conclusions of law and judgment and to set the case for trial. At this time the full import of the confusion which had accompanied the case became apparent. Judge Tolin said that he would like to grant the motion [Sup. R. 68, 76-77]:

> ". . . upon the presentation you have made and upon my own examination of the file I am inclined to set aside the findings . . . heretofore made, and set the case for trial. But if you have something, you are asking for something more, we will hear it."

and the Judge gave his reasons:

> "The Court: What sticks in my mind, Mr. Green, is that when this case was presented the defendant Glens Falls was represented by an attorney who, so far as getting things over to me was concerned, just didn't get them over. The defense points, both as to the facts and as to the law, were such that I felt the man was just talking in circles and I left the bench confused as to why he was defending the case, and since you had stated a good case for your client, I granted judgment.
>
> "Now, since then the attorney who presented a confused defense here has been substituted out, and we have a very articulate man, and I would kind of like to hear the whole case properly presented by both sides instead of only by your side."

The events leading up to this expression and the events following are set forth in sufficient detail in the Appendix to this brief and commented upon in the first point of Argument in this brief. An understanding of the confounded confusion cannot be conveyed in a word. Reference to the record itself or to the Appendix is necessary for an understanding of Appellants' first point of Argument. An abbreviated statement of the nature of the proceedings in the trial court appears in Appellants' original Opening Brief at pages 2 through 5 (Section II).

After the case was returned by the appellate court to the trial court, Appellants became convinced that the tangle of the record as evidenced by the remarks of the Judge quoted above was never sufficiently unraveled by the trial court to enable that court to determine the direction of the evidence or to follow the course of the legal argument and that the contradictions in the findings and the other errors upon which the appeal is based spring directly from this fact.

Accordingly, when the appellate court returned the case to the trial court, Appellants filed a motion to set the judgment, findings and conclusions aside, but this was never ruled upon. Instead the court ordered that the dismissal of the Farmers and Merchants Bank of Long Beach should be entered. This rendered the judgment final by eliminating the party not mentioned in the judgment. About ten days later the judge signed another order affecting the judgment as though the dismissal of the Bank had not been ordered. These actions were so inconsistent that Appellants conceived them to be inadvertent and moved for relief under Rule 60.

At the time of the argument of this motion, Appellee conceded that the judgment was in error as to amount and as to interest and stipulated that these obvious errors,

which had been many times pointed out should be corrected and that the order signed after the Bank had been dismissed should be recalled and set aside. Accordingly, the order referred to was recalled and set aside and the judgment itself was set aside and a new one was entered. But this did not cure the fundamental errors or in any way indicate that the Judge had reviewed the evidence, studied the appellate briefs or otherwise reconsidered the questions of law.

In fact, there is no indication that the court attempted to review the case in a manner to dispel the confusion which existed throughout down to the very day of this argument. On the contrary, the only relief afforded was pursuant to stipulation. The balance of the relief requested was denied as follows:

> "The Court: This court felt that the plaintiff had made out a case and that the matter having been submitted, the court having decided in favor of the plaintiff, that the fact that a defense might have been more expertly set forth is just a burden which defendants have along with the plaintiffs.
>
> "Parties who come into court must get their cases properly presented at the trial, and there must be a finality to decisions, having once found—and I see no reason to think I was wrong—that there was liability here. Although there was an error in the computation, that has now been corrected by stipulation.
>
> *"I think I will deny your present motion, Mr. Stephens, and let the appellate court review the record which was made here in part by your predecessor who tried the case differently, I suppose, than you would try it.*
>
> "But if we adopted some other rule it would mean that every time a lawyer adopts a trial method and

selects and rejects the matters which he will bring before the court and makes the wrong choices, that a litigant could then go out and get more expert counsel, come in and get a new trial.

"So I deny the present motion." [Sup. R. 93.] (Emphasis added.)

Appellants' counsel did not suggest to the court that a new hearing should be granted because a new lawyer had come into the case or because a different method of presenting the defense was desirable or that Appellants wanted to base the defense on either new theories or new facts or a new or different selection of matters to be brought before the court. Appellants wanted and still want only one thing, that the court deciding the case should understand the defense.

The point of the argument had been that the basis of decision should be an abiding conviction that one side is right and that no such conviction can be born unless the court understands both sides of the case. Further, the point had been that when the Judge realizes that he does not understand one side, he should make every effort to remedy this situation by granting further hearing if necessary.*

The Judge himself had been the one to suggest that the attorney before him might be able to clarify the defense. Then he denied the opportunity, apparently thinking that having once given judgment, he had no right to reopen the case. The fact that the confusion

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*". . . In simple English, the language of the 'other reason' clause (of F.R.C.P. 60) of all reasons except the five particularly specified, vests power in courts adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice." (*Klapport v. United States* (1948), 335 U. S. 601, 93 L. Ed. 266.)

which the Judge had confessed had not been overcome appears from the fact that he relied upon having no reason to think that his original decision was wrong rather than to find reason that he was right. Of course, since he did not understand the defense, he would not see reason to think that he was wrong unless he reviewed the matter as requested.

Appellants contend that it is an abuse of discretion to deny the relief requested when the trial court is fully aware that the decision was made because of a lack of understanding of a part of the case rather than because of an abiding conviction that the other side is right and should in justice prevail.

III.

Statement of Facts.

Appellants' original Opening Brief contains a statement of facts. See pages 5 through 13. The error referred to on page 12 of that statement was reflected in the judgment which was subsequently corrected when a new judgment was substituted.

Appellee included a statement of facts in its original Answering Brief at pages 1 and 2 thereof. Nothing in this statement conflicts with Appellants' statement except two often repeated false statements, to wit: (1) The specifications required that certain materials be purchased from Appellee. This is not supported by any reference to the record and in fact the record does not show that this is true. (2) The prime contractor (Appellant) forwarded the purchase order of the subcontroctor to Appellee. As a matter of agreed fact, the subcontractor sent the order directly to Appellee.

These erroneous statements are particularly dealt with at pages 1 and 2 of Appellants' original Reply Brief. The court is respectfully referred to the statements of fact above referred to.

IV.

Questions Involved and Manner in Which They Are Raised.

The questions involved and the manner in which they are raised are set forth in the original Appellants' Opening Brief at pages 13 to 16, inclusive. Question number 6 has been eliminated by the entry of a new judgment.

In addition to these questions, another question was raised which for convenience will be numbered 7.

7. *Has the trial court abused its discretion in denying relief from the judgment under Federal Rules of Civil Procedure 60(b)(6) when it appears that the court rendered judgment without understanding the whole case?*

This question is raised by motion for relief from said judgment [Sup. R. 19-24] and by Supplemental Designation of Points on which Appellants Intend to Rely [Sup. R. 96-97].

V.

Specification of Error Relied Upon.

Specification of error relied upon appears in the original Appellants' Opening Brief at pages 17-25, inclusive. Of these eight specifications, number 7 is no longer an issue, having been eliminated by a judgment substituted for the original one.

An additional specification of error which will be numbered 9 for convenience is as follows:

9. *Appellants intend to rely upon the point that the trial court committed reversible error in denying motion made by Appellants in the trial court under Federal Rules of Civil Procedure 60(b)(6).*

VI.
Summary of Argument.

(See Introduction to Argument in original Appellants' Opening Brief, pp. 25-27.)

Appellee states that the basic issue involved is: Has the surety obligated itself to the materialmen by the two common law bonds which it supplied? (Appellee's Ans. Br. p. 5.) The answer to this is that it has not. The bonds do not so provide nor was it the intention of the parties to protect the materialmen by these two bonds.

One bond was a Performance Bond and the other was a Payment Bond. They were both given by the subcontractor to protect the prime contractor. An accepted rule of construction and interpretation of contracts is that they will be so construed as to give meaning to every part. The two bonds construed together clearly indicate an intention to separate performance of the contract as such from payment of materialmen. Both the respective titles and the provisions of the bonds indicate this. If any meaning is to be ascribed to their designations, this is the meaning that must be recognized.

Proceeding upon this premise, the Performance Bond has been discharged because it is conceded that the work was completed and accepted by the Government as fully complying with the contract and its specifications. We then turn to the Payment Bond and find that it is conditioned in a manner expressly recognized by the California Civil Code. The surety is not liable there-

under unless the obligee, the prime contractor, suffers loss or damage as a result of the subcontractor's failure to pay his materialmen. The bond does not obligate the surety to pay the materialmen if the subcontractor does not. It only obligates the surety to *reimburse* the prime contractor for what he is compelled to pay to the materialmen *by reason of his Government contract, or subcontract.*

The prime contractor cannot be compelled to pay the materialmen because his contract with the Government does not obligate him to do so nor does his contract with the subcontractor. The Government contract required the prime contractor to protect the materialmen by posting a Miller Act Bond, but Appellee slept upon its rights and let the statutory time for asserting a claim lapse. So there is no way that the prime contractor is legally responsible to the Appellant materialman. Therefore, he can't suffer loss or damage as a result of the Government contract and as a consequence the surety can't be liable on the Payment Bond.

Both bonds are therefore eliminated because clearly they were never intended to assure payment to the Appellant materialman. On the contrary, they were exclusively for the protection of the prime contractor. Since he was not hurt, the surety is not liable.

In cases where only one bond has been furnished, labeled a Performance Bond, the courts have held that the surety has made itself responsible for the full performance of the contract including payment for materials used. The courts pointed out that the intention of the parties as ascertained from the surety contract determined this result. They had not enunciated a rule of law applicable to all so-called Performance Bonds. They had

ascertained intention and wherever the contrary intention appears the contrary result obtains.

Appellee speaks of relying upon an express or implied contract which creates liability to Appellee. Clearly the only possible source of such contractual relationship with the surety lies in the bonds which contain neither express provision for benefit of Appellee nor implication of liability. The bonds were written in connection with the prime Government contract and the subcontract. They do not relate to any other contracts or agreements and the surety could not be responsible for the performance or non-performance of any other contracts.

If the prime contractor made any agreements outside of the prime or subcontracts, the surety could not be held for their performance or non-performance. It is, therefore, manifest that if the prime contractor made any on-the-side agreements with the Appellee, the surety is not concerned with their performance or non-performance. Liability of the prime contractor on such contracts does not render the surety responsible.

There is a vague and indeterminable contention of express or implied obligation of the prime contractor, independent of the prime contract, the subcontract and the two bonds. Appellee has pointed to no evidence of this. The existence of this contention and the failure to abandon it in argument compels Appellants to meet these collateral issues.

The case may be reduced to the simple statement that there is absolutely no evidence in the case to support the judgment entered by the trial court. We have not undertaken to summarize the brief argument that the trial court should have granted relief from the judgment under F. R. C. P. Rule 60.

VII.
Argument.

Appellants respectfully refer the court to the original Appellants' Opening Brief commencing at page 28 for points 1, 2, 3, 4 and 5 of Argument. The points made appear in the index of this brief with page reference to the original Opening Brief. Point 6 is no longer applicable, having been corrected by the entry of a new judgment. Point 7 is new.

7. When the Judge of the Trial Court Recognized and Acknowledged That He Had Never Understood the Appellants' Side of the Case (the Defense to the Action) and Thought That Appellants' Counsel Who Was Before the Court Could Present Such Defense so That It Could Be Understood, It Was an Abuse of Discretion and Error to Refuse to Grant Relief From the Judgment Under F. R. C. P., Section 60, to Permit the Presentation of the Defense.

The judgment from which this appeal is taken was entered on June 9, 1953, but did not become final until March 23, 1956. On that date the Clerk docketed the dismissal of the Farmers and Merchants Bank of Long Beach. No notice of the docketing of the dismissal was given to the parties as required by F. R. C. P. 77(d). As a consequence the time within which Appellants could make a motion under Rule 59 to set aside findings of fact and conclusions of law and judgment and to set the matter for trial expired before Appellants discovered that the judgment had become final. Appellants' only recourse was to seek relief under Rule 60.

Appellants' motion under Rule 60 urged four points:

(1) That the *ex parte, nunc pro tunc* order of March 30, 1956, be recalled and set aside;

(2) That the findings of fact and conclusions of law and judgment be recalled and set aside; and

(3) A new judgment be entered; or

(4) The matter be set for trial.

The District Court recalled and set aside the *nunc pro tunc* order of March 30, 1956 and the judgment and ordered that a new and corrected judgment be entered. The trial court refused to set aside the findings and conclusions and to set the case for trial.

At the time of the hearing on Appellants' motions the District Court stated that it had never understood the Appellants' case and that it would like to hear a presentation of the defense. The court then denied Appellants' motions. It would appear that the court felt that justice would be better served by setting aside its judgment and granting a new trial, but believed that it lacked the power to do so.

But the District Court did have jurisdiction to grant Appellants' motion, and should have done so.

Rule 60(b) provides in part as follows:

> "On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:
>
> (1) Mistake, inadvertence, surprise, or excusable neglect; . . . (6) any other reason justifying relief from the operation of the judgment."

The Notes of Advisory Committee on Amendments to Rules make the following comment with reference to the above quoted portion of Rule 60(b):

> "The qualifying pronoun 'his' has been eliminated on the basis that it is too restrictive, and that the subdivision should include the mistake or neglect of others which may be just as material and call just as much for supervisory jurisdiction as where the judgment is taken against the party through his mistake, inadvertence, etc." (28 U. S. C. A. Rule 60, p. 312.)

1946 revision of Rule 60. Professor Moore comments on the effect of the change as follows:

> "The 1946 revision of 60(b) deleted the qualifying phrase *his,* abolished for civil actions the old common law and equitable remedies, and particularized the categories under which relief could be had. As a result of the deletion of the pronoun *his,* relief for mistake, inadvertence, etc. was extended to include not only the mistake of the moving party, but also the mistake of the adverse party, third persons, and even the court." (7 Moore's Federal Practice 236.)

and concludes that:

> ". . . While there is some judicial authority that may be *contra,* we believe that there should be sufficient flexibility in the Rules so that the district court had the power under 60(b)(1) to grant relief for error of law apparent, on motion made within a reasonable time." (*Idem,* p. 237.)

In addition to clause (1) of Rule 60(b), discussed above, which provides for relief from mistakes of law by the court, there is another clause which is most applicable to the unusual situation presented by the instant case.

Clause (6) of Rule 60(b) provides for relief from a final judgment for "any other reason justifying relief from the operation of the judgment."

The United States Supreme Court has interpreted Clause (6) as a broad grant of power to a trial court to grant relief from a final judgment whenever justice so requires.

In *Klapport v. United States* (1948), 335 U. S. 601, 93 L. Ed. 266, the Supreme Court reversed the trial court's denial of a motion to set aside a default judgment in a proceeding to revoke a certificate of naturalization. The motion was made some four years after the judgment on the ground that defendant was imprisoned shortly after the complaint was filed and was without funds to retain an attorney to represent him. The Supreme Court stated (335 U. S. 614-615, 93 L. Ed. 277):

> ". . . In simple English, the language of the 'other reason' clause of all other reasons except the five particularly specified, vests power in courts adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice."

It is respectfully submitted that the erroneous findings of fact and conclusions of law resulted from the trial court's admitted confusion and that the situation here presented, where the trial court admits that it was confused and that it is inclined to set aside the findings and grant a new trial [Sup. R. 68, 76, 77], but fails to do so, apparently on the belief it had no power to, is clearly within the scope of Clause (6) of Rule 60(b) and that the trial court erred in denying Appellants' motions.

Since Appellants' motion under Rule 60 to set aside the findings and conclusions is analogous to a motion

under Rule 59, the cases decided under the latter rule deserve consideration.

In a motion for a new trial, the trial court has the discretionary power to reweigh the evidence and it is its duty to exercise that power to prevent a miscarriage of justice.

> *Garrison v. United States* (4th Cir., 1932), 62 F. 2d 42, 43;
>
> *Aetna Casualty & Surety Co. v. Yeatts* (4 Cir. 1941), 122 F. 2d 350, 354;
>
> *Citizens National Bank of Lubbock v. Spear* (5th Cir., 1955), 220 F. 2d 889.

In *Magee v. General Motors Corp.* (3rd Cir., 1954), 213 F. 2d 899, the Third Circuit reversed an order of a District Court denying a motion for a new trial and directed the lower court to reconsider the motion where the latter mistakenly believed it had no power to reweigh the evidence in ruling on the motion.

In *Charles v. Norfolk & Western Ry. Co.* (1951), 188 F. 2d 691 (Cert. den. 342 U. S. 831), the Seventh Circuit reversed the trial court's denial of a motion for a new trial, stating at page 695:

> "Of course, it is true that ordinarily the granting or refusing of a new trial, being a matter within the discretion of the trial judge, is not subject to review. (Citing cases) But in the final analysis judgment in each case must be influenced by conviction resulting from examination of the proceedings in their entirety, tempered but not governed in any rigid sense of *stare decisis* by what has been done in any similiar situations, (citing case)."

It is apparent from the record that the judgment in this case was not founded upon a "conviction resulting from examination of the proceedings in their entirety."

It is the duty of the trial court to consider the case in its entirety and to come to a conclusion that one side is right. Even though the case is close and hard to decide and even though the deciding factor might be very slight, the court should be convinced that right is on the side of the prevailing party. If all things are equal and there is no factor on one side which tips the scale, then it is the duty of the court to decide for the defendant. A decision for the plaintiff must originate in an affirmative moral conviction that the plaintiff is right. A judgment for the plaintiff is not warranted by the fact that the judge can see no reason to think that the plaintiff was wrong.

While the decision of a trial court may be based upon some small factor, the appellate court arrives at its decision by a process which is almost the reverse. Fundamentally, it must assume that the trial court has functioned properly and that the record may not reflect the factors of decision in absolute perspective. Consequently if there is substantial evidence in support of the judgment, it will not be disturbed on appeal.

When the trial court recognizes that it did not understand one side of the case, and at the same time has before it the means and opportunity for understanding, it acknowledges that it has not properly performed its function. It is an abuse of discretion to refuse to take whatever step may be required to properly fulfill its function.

This should not be passed on to the appellate court. But when it has been passed on to the appellate court as in this case, the appellate court should recognize that the usual assumption that the trial court has functioned properly cannot be indulged. We think that two courses are open: (1) to order the trial court to hear the case, or (2) decide it as the trial court would.

We respectfully urge that the judgment should not be sustained for the reasons just discussed and further that it was an abuse of discretion and reversible error for the trial judge to refuse relief from the judgment in the circumstances. However, there was no testimony taken in the trial court. There were no factors which are not now fully presented by the existing record. The transcript is short. The facts have been thoroughly analyzed and the law fully discussed. The appellate court will of necessity come to grips with the entire case to decide the appeal on its merits. When these conditions exist, fairness and justice, including economy to court and litigants, make it appropriate for the appellate court to reconsider the entire case from the point of view of a trial court and decide it (*United States v. United States Gypsum Co.,* 333 U. S. 364, 397).

Conclusion.

Fundamentally, fairness and justice are based upon simple rules, and simple rules are applicable to this case. The first one is that parties to a private contract are not liable except according to its terms. In this respect surety contracts are not different from other contracts. The terms of the surety contracts in this action do not protect American Seating Company from loss. The second simple principle applicable in this action is that

judgment must be predicated upon an affirmative preponderance of right when all of the case is considered. A judgment based upon only one side of the case should be set aside.

On both principles the judgment should be reversed. Because there is no evidence upon which liability of Appellants can be predicated, the judgment should be reversed with instructions to enter a judgment against Appellee.

Respectfully submitted,

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APPENDIX.

Supplementing Part II of This Brief.

The Nature of the Proceedings in the Trial Court.

No witnesses were sworn and no oral testimony was taken. The pretrial proceedings were stipulated to be considered a part of the trial. The record of the trial, therefore, starts with the pretrial conference.

On April 1, 1953, the counsel for the parties met with Judge Tolin for a pretrial conference. The uneven temper of the conference is obvious from the Reporter's Transcript [R. 69, 70, 74, 76, 77, 79, 80, 88, 89, 107, 109, 110, 112]. The Judge commented a number of times on the difficulty between counsel, saying at one point that he thought that it would be better for their "respective healths" if they would "avoid taking umbrage with one another." [R. 80.] And Mr. Green, counsel for plaintiff (Appellee), said to Mr. McCall, counsel for defendants (Appellants), "I don't seem to be able to agree with you even as to the time of day." [R. 107].

In this atmosphere, an attempt was made to obtain an agreed statement of facts. Counsel for plaintiff (Appellee) undertook to orally state the facts, with constant interruptions. At first, counsel for defendants undertook to object to the conclusions in the oral statement, but there seemed to be some indication that this was not necessary [R. 78]. When the statement was finished, little progress seemed to have been made because the oral statement contained conclusions and defendants' counsel adhered to his original position that the statement which had been read from plaintiff's brief theretofore filed, was accurate when shorn of conclusions [R. 96, 97].

Defendants' statement of facts was not read into the record but simply incorporated by reference to their brief theretofore filed with some oral changes accepted by Mr. McCall to accommodate Mr. Green [R. 98, 103]. Realizing the confusion of the conference, Mr. McCall suggested that a transcript be prepared by the reporter and that the attorneys then attempt to agree to a statement of facts in writing [R. 109, 110]. The court replied to this as follows:

> "The Court: Actually, this is not a particularly long transcript, and having noted how you get on each other's nerves it seems to be a mutual attribute here, and I don't want to get you into further fights. If you wish to do that, it is agreeable to me; but unless you mutually request it, I would suggest that you let me wade through the transcript. It will not be such a difficult task. This has been a relatively short proceeding."

Sixteen exhibits were marked for identification at the pretrial conference. Almost all were objected to upon the grounds that their genuineness could not be confirmed at that time and that they were irrelevant and immaterial. When it seemed that the "discussion" of the facts and exhibits had concluded, the court commented:

> "The Court: We have a record here. It is not, perhaps an Emily Post record, but it is a good legal record." [R. 110.]

A trial date was selected and time allowed for briefs.

The month elapsing between the pretrial and the trial did nothing to improve the atmosphere. Additional exhibits were offered and introduced into evidence. Then the court admitted all of the exhibits which were offered for identification at the pretrial and promptly set aside

the ruling to permit objection [R. 116]. Although the court had read the prime contract before it was introduced into evidence [R. 114] and all of the other exhibits for identification [R. 116], the court reserved a ruling on the objections:

> "The Court: I will reserve ruling until we have heard the case and have heard your objections." [R. 117.]

Plaintiff amended the complaint, increasing the demand to take advantage of an obvious and inadvertent error as fully explained at pages 12 and 13 of Appellants' Opening Brief. This was not corrected until just before the current appeal was filed.

The case was submitted by both parties [R. 117 and 118] with the understanding that the record of the pretrial is also a part of the record of the trial [R. 119]. There was still no ruling on admission of the exhibits marked for identification. The grounds of objection were understood to be that these exhibits were not relevant or material [R. 119]. In fact, a letter had apparently been prepared and given to the Judge specifying which exhibits were objected to and the grounds of objection [R. 122].

At this point, the court being urged to rule upon the admissibility of the exhibits which he had just stated that he had read. said:

> "The Court: Mr. Green, you have gone over the exhibits. I feel that I should do that in order to ground my familiarity for the purpose of ruling.
>
> Mr. Green: Yes, your Honor.
>
> The Court: It is still, perhaps, going to be difficult to rule with proper finality on the relevancy of a document until we have the argument.

I would like, however, for counsel to indicate at this hearing which of the exhibits he objects to on the ground of relevancy and I will give that matter special study.

Then when I get to a decision on the case I will say in the memorandum that exhibit so-and-so is admitted and exhibit so-and-so is rejected.

So that you will have a record upon what I base my findings, but the nature of these exhibits is such that the question of relevancy rather than of weight to be given to these documents is what is to be considered.

There are some things that are somewhat on the edge of relevancy in law and others that are right at the spoke of the wheel.

It is going to be difficult for me to give an absolute decision until I have heard your arguments." [R. 121.]

Mr. Green wanted to argue the plaintiff's case but the court said that he wanted to get the matter of the exhibits straightened out and asked defendants' counsel if they were prepared to tell the court which exhibits they were objecting to [R. 122]. Mr. McCall referred to the letter covering this subject and the court acknowledged having seen it [R. 122]. Counsel then orally told the court which ones he had no objection to and which ones he objected to [R. 122]. Mr. Green suggested that they be offered again one by one and this proposal was adopted [R. 122].

The following exhibits were offered and admitted: Exhibit 2 [R. 123], Exhibit 3 [R. 123], Exhibit 4 [R. 123], Exhibit 5 [R. 123], (subject to a motion to strike it if such a motion is in the brief to be filed), Exhibit 7

[R. 125], Exhibit 8 [R. 125]. Then Mr. Green offered Exhibit 9, which met with objection. The court had this to say:

> "The Court: It is my tentative view that this document is admissible.
>
> However, because there has been an objection and my view is still tentative enough that I am sort of standing on it with one foot instead of both I don't have too much confidence in my understanding of relevancy.
>
> I will reserve ruling on this until after argument." [R. 126-127.]

Exhibit 11 was offered. The court asked Mr. Green how relevant it is and Mr. Green replied that he didn't know because he didn't know what the defense was and the Judge commented that he didn't either and that the defense had rested at which point the following colloquy took place:

> "The Court: They have rested their evidence.
>
> Mr. Green: I know, your Honor, that is why we want to put these things in and have them in the record.
>
> The Court: We are sort of backtracking to the plaintiff's case in order to get a record because of uncertainty as to what the present record is.
>
> Now (*sic*) having any defense presented as to which this would be relevant the objection is sustained as to No. 11 with permission to reoffer if anything is presented which would make it relevant." [R. 128.]

The offer of Exhibit 11 was withdrawn.

Exhibit 12 was offered in evidence but nothing was done about it [R. 128]. Exhibits 14, 15 and 16 were admitted [R. 129]. Exhibit 1 was offered and met with objection. The court reserved ruling until argument [R. 130]. Exhibits 12 and 13 were accepted without objection [R. 130]. Actually, Exhibits 16 and 17 had already been received in evidence [R. 115-116].

The court had reserved a ruling on Exhibits 1 and 9. Exhibit 10 had never been offered in evidence, and never was, while No. 11 had been withdrawn.

At the request of the court, counsel for defendants, Appellants here, briefly outlined the defense [R. 131, 133]. Mr. Green then argued his case for the plaintiff, during which he made reference to cases cited in briefs already on file. The court commented:

> "The Court: I have read the exhibits but have deferred reading the briefs until I have heard the argument." [R. 137.]

The court set a time for filing briefs, commenting:

> "I will give both sides time to file a brief, but it is not required because the principles in this case are rather simple and if no one files any briefs and my law clerk and I can go into the library, we can work it off in a couple of hours. If you can save us that couple of hours with briefs that are complete enough with quotations, you may be sure I will read all of them." [R. 145.]

The case stood submitted on May 25 and the decision was recorded in a minute order dated May 27, 1953 [R. 34]. While a transcript of the proceedings at the trial was prepared, the certificate of the reporter indicates that this was not available until June 19, which was not

only after the date of decision, but after the findings, conclusions and judgment had been signed and filed, which was June 9, 1953. So the court did not have a transcript of the May 8, 1953 proceedings before it at the time of decision.

As has been indicated, it was contemplated that rather than have opposing counsel attempt to agree upon a statement of the facts, the court would review the transcript. It was further anticipated that the court would prepare a memorandum which would among other things indicate the ruling upon the exhibits where reserved. The court did not prepare a memorandum or rule upon the admissibility of exhibits.

A motion for a new trial was filed on June 19, 1953 [R. 43-55] and duly noticed [R. 55-56]. This motion specifically called attention to and was in part based upon the fact that the court had not ruled upon the admissibility of Exhibits 1, 9 and 10 (although 10 was never offered) [R. 54]. This motion was twice continued on the court's own motion and was argued October 19, 1953 to stand submitted October 26, 1953 [R. 58]. It was denied December 31, 1953 by minute order to that effect [R. 59].

Both defendants gave notice of appeal [R. 59]. After the appeal was docketed as number 14305-T, Appellants moved the Court of Appeals to clarify the Record on Appeal by striking those exhibits which were not admitted into evidence in the District Court, to wit: Exhibits 1, 9, 10 and 11. At the time of the hearing on this motion, Mr. Green presented an order signed by Judge Tolin as the trial judge with an addition in his own handwriting [Sup. R. 3-4]. This had been obtained *ex parte* without any notice to counsel for Appellants, although counsel for

Appellants was in the same building in the courtroom of the Court of Appeals while Mr. Green was obtaining the order on the third floor in Judge Tolin's chambers [Sup. R. 60]. The handwritten addition reads as follows:

> "This order signed this 5th day of April, 1954, *nunc pro tunc* June 1, 1953, for the reason that by inadvertence the Exhibits were not received into evidence. The Court mis-remembered the events at trial and failed to rule as it intended to do, that the Exhibits be received.
>
> /s/ Ernest A. Tolin,
> Judge."

It should be observed that the order purports to admit the exhibits *nunc pro tunc* as of June 1, 1953, which is a time subsequent to the court's decision. (Parenthetically, it should be here noted that these events are not recited as a foundation to a challenge of consideration of such exhibits in arriving at a decision in this appeal. Appellants stipulated in the Court of Appeals that they might be considered a part of the record on appeal.)

The Court of Appeals held that the appeal was premature. When the mandate was issued, on September 30, 1955, Appellants (Defendants below) filed and duly noticed a Motion to Set Aside Judgment, Findings of Fact and Conclusions of Law and to Set Case for Trial, Statement of Reasons in Support Therefor and Notice of Motion [Sup. R. 4-8]. The hearing of said motion was continued at the request of counsel from October 14 to October 31, 1955 [Sup. R. 8]. Meanwhile counsel for plaintiff filed Notice of Motion to Amend Judgment *Nunc Pro Tunc,* Statement of Reasons in Support Thereof [Sup. R. 9-12].

Before court on the date of the hearing, October 31, 1955, counsel for plaintiff and counsel for defendant Farmers and Merchants Bank of Long Beach saw Judge Tolin in chambers without notice to counsel for Appellants and presented a Stipulation and Order for Dismissal of the Bank. Judge Tolin signed the order [Sup. R. 18].

Counsel for Appellants expressed the fear that the objective of the dismissal was to render the judgment final as of the date the judgment was entered and thus deprive the parties of their right to appeal [Sup. R. 54]. This seemed to be in accord with Mr. Green's view [Sup. R. 55, 56]. A continuance was requested until the law could be looked into. Mr. Green then requested that the continuance go over to January. It was then pointed out to the court that the same result would obtain from a continuance of 60 days unless the judgment were first set aside [Sup. R. 55]. The court suggested that the same result could be obtained by setting aside the dismissal [Sup. R. 57], but followed the suggestion with this comment:

> "The Court: I anticipate that Mr. Green will present a dismissal again before the next hearing, and if he does I will grant it, unless you have answered and made it necessary for the consent of the bank to the entry of the dismissal by asking for some affirmative relief or something of that kind." [Sup. R. 57.]

Hearing on the motions was continued to January 16, 1956, and a minute order was made that the dismissal should not be filed [Sup. R. 13-14].

On January 16, 1956, the motions came on for argument. The court did not realize that the matters were on the calendar [Sup. R. 61]. Before Appellants' counsel

had completed his argument and still had other points to make, the court interrupted to say that he was inclined to grant the motion [Sup. R. 68] and later explained his reasons as being that the court left the bench confused at the end of the trial, didn't understand why the case was being defended and would now like to hear the whole case properly presented by both sides instead of only one [Sup. R. 77].

Mr. Green argued that the burden of obtaining a final order which could be appealed was the duty of the Appellants who had lost the case [Sup. R. 69, 70, 72 and 79]. He argued that the court could correct its order *nunc pro tunc* as requested by plaintiff to make it final or enter the dismissal for the same purpose, but that it lost jurisdiction to vacate it because of the passage of time [Sup. R. 76, 81]. Appellants' counsel pointed out that the judgment itself was erroneous in two respects, one conceded and one not [Sup. R. 83]. Appellee then argued that because an error in the judgment had been conceded in briefs in the appeal which had been dismissed, the error had been corrected in the judgment [Sup. R. 84]. All motions were ordered submitted [Sup. R. 86].

On March 23, 1956, the court directed the clerk to enter the order dismissing the Farmers and Merchants Bank of Long Beach and the clerk did so on that day [Sup. R. 18]. No notice of this action was ever sent to the parties.

On March 30, 1956, the court signed the Order *Ex Parte Nunc Pro Tunc* which was designed to conform the Judgment to Rule 54(b) and it was filed and docketed and entered on the same day [Sup. R. 18-19]. Notice of this action was mailed by the clerk and this notice was designated as a part of the record on appeal, item 65

[Sup. R. 43] and in Appellants' designation of the record which is material to the appeal as item 10 thereof [Sup. R. 98]. The same was not otherwise printed in the record, possibly because it consisted of a postcard notice to counsel only. Suffice it to say that this notice was the cause of inquiry as to the disposition of the original motion filed by Appellants. This was never ruled upon.

Assuming that entry of the dismissal of the Bank rendered the judgment final at that time, the time within which a motion for a new trial could be made had already expired when the clerk's notice was sent out. To obtain relief from the judgment which was concededly defective in amount, and relief from a judgment on the ground that the court admittedly had not understood the case, Appellants filed a motion under F. R. C. P. 60 [Sup. R. 19-25], obtained an order shortening time and gave the required notice [Sup. R. 19-25] and obtained a stay of execution [Sup. R. 25-26].

Relief demanded by the moving party was granted in part pursuant to stipulation as follows: (1) the *nunc pro tunc* order of March 30, 1956 [Sup. R. 18-19] was recalled and set aside; (2) Judgment itself was recalled; (3) a new and corrected judgment was ordered entered correcting the conceded errors in amount. The balance of the relief requested was denied [Sup. R. 27]. The corrected judgment was entered April 18, 1956 [Sup. R. 28-29] from which Appellants have appealed [Sup. R. 30].